Supreme Court, U. S.
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No. 95-1009

In The

Supreme Court of the United States

October Term, 1995

MILFORD C. HORTON,

Petitioner,

vs.

MONROE SYSTEMS FOR BUSINESS, INC., GERALD NEUMANN, MARVIN PASTOR, GERALD TULLY, MICHAEL GARDNER, HAROLD SHORT and JOHN MISKEW,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a second Rule 59, Federal Rules of Civil Procedure, Motion further stay the time for appeal under Rule 4, Federal Rules of Appellate Procedure?

RULE 29.b DISCLOSURE

Monroe Systems for Business, Inc. is a privately-owned corporation and has neither a parent corporation nor any subsidiary corporations.

TABLE OF CONTENTS

	Page
Question Presented	i
Rule 29.b Disclosure	ii
Table of Contents	iii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	1
I. The Asserted Tension With This Court's Decisions in *Ibarra* and *Indrelunas* (Petition pp. 4-6, Points 1 and 2).	2
II. Petitioner's Reliance on the Asserted Conflict With *Zazu Designs* (Petition pp. 6-7, Point 3).	4
III. Petitioner's Claim That Multiple Motions Within 10 days of Judgment Are Proper (Petition pp. 8-12, Point 4).	5
Conclusion	7

TABLE OF CITATIONS

Cases Cited:

American Security Bank, N.A. v. Jim Y. Harrison Realty, 670 F.2d 317 (D.C. Cir. 1982) 2, 3, 5

Contents

	Page
Beaulieu v. United States, 497 U.S. 1039 (1990)	1
Browder v. Director, Ill. Dep't of Corrections, 434 U.S. 257 (1978)	6
Charles L.M. v. Northeast I.S.D., 884 F.2d 869 (5th Cir. 1989)	5
Dixie Sand & Gravel v. Tennessee Valley Authority, 631 F.2d 73 (5th Cir. 1980)	6
Dunn v. Truck World, Inc., 929 F.2d 311 (7th Cir. 1991)	3
EEOC v. Central Mtr. Lines, Inc., 537 F.2d 1162 (4th Cir. 1976)	5
Firstier Mortg. Co. v. Investors Mortg. Co., 111 S. Ct. 648 (1991)	3
Greater Houston Chap., A.C.L.U. v. Eckels, 755 F.2d 426 (5th Cir. 1985)	3
Hilst v. Bowen, 874 F.2d 725 (10th Cir. 1989)	2, 3
Jurgens v. McKasy, 905 F.2d 382 (Fed. Cir. 1990)	3
McCray v. New York, 461 U.S. 961 (1983)	1
Murrary v. District of Columbia, 52 F.3d 353 (D.C. Cir. 1995)	5

Contents

	Page
United States v. Ibarra, __ U.S. __, 112 S. Ct. 4 (1991)	2, 3, 4
United States v. Indrelunas, 411 U.S. 216 (1973)	2
United States v. Marsh, 700 F.2d 1322 (10th Cir. 1983)	3
Zazu Designs v. L'Oreal, S.A., 979 F.2d 499 (7th Cir. 1992)	4, 5
Rules Cited:	
Federal Rule of Appellate Procedure 4	i, 1, 6
Federal Rule of Appellate Procedure 4(a)(2)	3
Federal Rule of Civil Procedure 58	2, 3
Federal Rule of Civil Procedure 59	i, 1, 2, 3, 4, 5, 6
Other Authorities Cited:	
6A Moore's Federal Practice ¶ 59.09[1]	2
9 Moore's Federal Practice ¶ 204.12[1]	5, 6
9 Moore's Federal Practice ¶ 204.12[4]	2

STATEMENT OF THE CASE

Respondents do not disagree with Petitioner's Statement of the Case except they would specifically note that Petitioner's attempted characterizations of his two successive Motions is misleading. The first Motion filed on January 13, 1995, was styled "Plaintiff's Motion to Reconsider Order of Summary Judgment." The second Motion was styled "Plaintiff's Renewal of His Motion to Reconsider Order of Summary Judgment." Petitioner attempts to characterize only the second (post judgment) Motion as a Rule 59 Motion.[1] As discussed below, the *first* (pre-judgment) Motion *was* a timely served and filed Rule 59 Motion. The second Motion simply reurgued the grounds advanced in the first Motion and its filing did not further stay the time for appeal.

REASONS FOR DENYING THE WRIT

Petitioner asserts that the decision below is "in tension with" prior decisions of this Court and conflicts with a decision of the Court of Appeals for the Seventh Circuit (Petition pp. 3-4). The petition should be denied because there is *no* conflict with any decision of this Court and Petitioner's argument starts from a uniformly rejected premise. Further, the asserted conflict with the decision of the Seventh Circuit is on an issue that is narrowly confined, has not been adequately addressed in the circuit courts and is not sufficiently developed among the circuits to warrant this Court's intervention. *See, e.g., Beaulieu v. United States*, 497 U.S. 1039 (1990) (Justice White, dissenting from denial of certiorari) (conflict should be "sufficiently crystallized" before considered); *McCray v. New York*, 461 U.S. 961 (1983). Finally, as discussed more fully below, the analysis of the Seventh Circuit does not square with the history, purpose and wording of Rule 59 and Rule 4, Fed. R. App. P.

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1. Rule 59, Federal Rules of Civil Procedure, hereinafter "Rule 59."

I.

THE ASSERTED TENSION WITH THIS COURT'S DECISIONS IN *IBARRA* AND *INDRELUNAS* (PETITION PP. 4-6, POINTS 1 AND 2).

Contrary to Petitioner's argument and characterization (Petition pp. 4-5), the decision below is not inconsistent with *Indrelunas*. In this case, the Rule 58, Fed. R. Civ. P., judgment *was* separately entered on the docket on February 15, 1995. On the same day a separate order denying Petitioner's first Rule 59 Motion was also entered. Since the judgment was separately entered and the Motion denied, the time for appeal was triggered. *See, e.g., Hilst v. Bowen*, 874 F.2d 725, 726 (10th Cir. 1989); *American Security Bank, N.A. v. Jim Y. Harrison Realty*, 670 F.2d 317, 320-21 (D.C. Cir. 1982).[2] No inconsistency exists and the decision below is *consistent* with the decisions of the other courts of appeal.

As noted in 6A MOORE'S FEDERAL PRACTICE ¶ 59.09[1] at note 17 (p. 59-221):

> Rule 56 of the April 1937 Draft (counterpart of Federal Rule 59) read: "A motion for a new trial shall be served *within* ten days after the entry of judgment. . . ." The Final Report struck out "within" and substituted in lieu

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2. The Petitioner's claim that the Motion was denied before the judgment was entered is based on the district court clerk first entering the Motion denial order on the docket sheet. What is clear is that the district court considered and denied the Motion *and* entered judgment, so no question as to intent exists and the time for appeal was triggered. *See, e.g. American Security Bank* (in such case there is no tolling effect to the Motion). *See generally*, 9 JAMES MOORE, MOORE'S FEDERAL PRACTICE ¶ 204.12[4] (2d ed.) (MOORE'S FEDERAL PRACTICE) and cases cited, notes 3-6.

> thereof the words "not later than" so that there would be no implication that the motion for new trial could not be made until after entry of judgment.

The courts of appeal which have addressed the wording of Rule 59 agree uniformly that a timely and proper Motion can be served and filed pre-judgment. This is what occurred in this case. *See, e.g., Dunn v. Truck World, Inc.*, 929 F.2d 311, 312-13 (7th Cir. 1991); *Jurgens v. McKasy*, 905 F.2d 382, 385-86 (Fed. Cir. 1990) (and cases cited); *Hilst v. Bowen, supra*; *Greater Houston Chap., A.C.L.U. v. Eckels*, 755 F.2d 426, 427-28 (5th Cir. 1985); *American Security Bank, supra.*

Petitioner proceeds to argue that a pre-judgment Motion is to be ignored and to give it effect is inconsistent with *Ibarra* (Petition pp. 5-6). However, Petitioner subsequently acknowledges (*id.* at 8) that the two motion issue was expressly noted by the Court in *Ibarra* as not being before it. 112 S.Ct. at 7 n.3.[3] Aside from this Court's express reservation of the issue, the decision below is not contrary to *Ibarra's* rationale, once it is recognized that a proper and timely filing of a Rule 59 Motion *pre-judgment* can occur. The commentators and courts of appeal which have addressed the issue, as discussed above, have uniformly so held. Indeed, as this Court has held, even a notice of appeal can be filed before a final judgment is entered and, under Rule 4(a)(2), Fed. R. App. P., becomes effective when the Rule 58 judgment is entered. *Firstier Mortg. Co. v. Investors Mortg. Co.*, 111 S. Ct. 648 (1991). In sum, the decision below is neither inconsistent with nor "in tension" with this Court's decisions.

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3. *Ibarra* was a criminal case. In the footnote reserving the issue, the Court cited the Tenth Circuit's opinion in *United States v. Marsh*, 700 F.2d 1322, 1324 (10th Cir. 1983), which held a second filed motion for rehearing did not further extend the time for appeal.

II.

PETITIONER'S RELIANCE ON THE ASSERTED CONFLICT WITH *ZAZU DESIGNS* (PETITION PP. 6-7, POINT 3).

The issue presented is whether the second Rule 59 Motion *further* extends the time for appeal. In this case, the first (pre-judgment) Motion was denied and judgment entered on February 15, 1995. The notice of appeal was not filed until March 28, 1995, more than thirty days later and was untimely. *See, e.g., American Security Bank, supra* (where motion denied and judgment entered on same day, there is no tolling of the time for appeal under Rule 4, Fed. R. App. P.). To avoid this consequence, Petitioner relies upon his second filed Motion and seeks to measure the time for appeal from the date of its denial. In support, Petitioner relies upon the Seventh Circuit's decision in *Zazu Designs* and its treatment in MOORE'S FEDERAL PRACTICE.

A review of *Zazu Designs* reveals that the issue of the timeliness and effectiveness of the first motion was not considered. The opinion lacks any analysis or reasoning setting forth the basis upon which the expressed conclusionary rationale was justified. Indeed, its citation (979 F.2d at 502) to this Court's opinion in *Ibarra* clearly demonstrates that it failed to address or consider the fact that the first filed Rule 59 Motion was a timely and proper motion. *Zazu Designs* is also clearly wrong in concluding that a pre-judgment motion can be ignored. Rule 59 dictates otherwise, as the uniform decisions of the courts of appeal, set forth above, clearly demonstrate.

Petitioner's further argument that the "but cf" citation to *Zazu Designs* by MOORE'S FEDERAL PRACTICE (Petition pp. 6-7) demonstrates that a pre-judgment/post-judgment situation is different from that involving two post-judgment motions, simply is incorrect. On the contrary, in the context used in MOORE'S

FEDERAL PRACTICE, the citation demonstrates that *Zazu Designs* is out of step with the other cases cited. As the decisions of the courts of appeal set forth below demonstrate, a second Rule 59 Motion does not further extend the time for appeal.

III.

PETITIONER'S CLAIM THAT MULTIPLE MOTIONS WITHIN 10 DAYS OF JUDGMENT ARE PROPER (PETITION PP. 8-12, POINT 4).

Petitioner argues that his second Motion was not a motion to reconsider the denial of the first filed Motion. Accepting this as true does not detract from the fact that a second served and filed motion for reconsideration of the underlying decision and judgment does *not* further extend the time for appeal.[4] *See, e.g., Murrary v. District of Columbia*, 52 F.3d 353, 356 (D.C. Cir. 1995); *Charles L.M. v. Northeast I.S.D.*, 884 F.2d 869, 870 (5th Cir. 1989); *American Security Bank, supra; EEOC v. Central Mtr. Lines, Inc.*, 537 F.2d 1162, 1165 (4th Cir. 1976). *See also*, 9 MOORE'S FEDERAL PRACTICE ¶ 204.12[1] and cases cited, pages 4-95-96, n.63.

Petitioner, in short, seeks to have this Court declare that two or more Rule 59 Motions, seeking to alter the judgment, if served and filed "within" ten days of the judgment's entry, operate to stay the time for appeal until the last such Motion is decided.[5]

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4. Indeed, the characterization of the second Motion as seeking reconsideration of the denial of the first Motion simply involves the style of the second Motion. The purpose of the second Motion is to have the court again "rethink" the asserted error in its *judgment* which was allegedly overlooked when the first Motion was denied. The second Motion still clearly relates to the asserted error in the underlying judgment.

5. Petitioner concedes that a second post-judgment Rule 59 Motion filed more than ten days after entry of judgment does not operate to stay the time for appeal (*e.g.* Petition, pp. 10-12).

This argument simply ignores the fact that "only by an *original* motion of the type specified . . ." is the time for appeal under Rule 4, Fed. R. App. P., stayed. 9 MOORE'S FEDERAL PRACTICE ¶ 204.12[1] at page 4-95.

Equally to the point, Petitioner's rationale does not comport with the aim of finality and certainty espoused in the Rules. *See, e.g., Browder v. Director, Ill. Dep't of Corrections*, 434 U.S. 257, 264 (1978). Otherwise, a second, third, or fourth Rule 59 Motion could be served and filed after judgment is entered and the first pre-judgment motion had been denied. Must each such motion be addressed, so long as they were served within ten days of entry of judgment? Does the time for appeal run only from the denial of the last such filed motion or from the denial of the second such filed motion? *See, e.g., Dixie Sand & Gravel v. Tennessee Valley Authority*, 631 F.2d 73, 75 (5th Cir. 1980); 9 MOORE'S FEDERAL PRACTICE ¶ 204.12[1] at page 4-95, n.63 (noting that the theoretical ability to delay and postpone the time for appeal is one of the reasons why only the first such motion is considered effective to delay the judgment's finality and time for appeal).

Simply put, the "bright line" rule is that one timely served and filed motion under Rule 59 and its denial triggers the timetable for appeal under Rule 4, Fed. R. App. P. If that motion is served and filed pre-judgment and denied, the entry of judgment (or date of denial, if later) sets the time for appeal. This result is certain, and it advances the Rule's goals of finality and certainty.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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